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No. 08-50

Supreme Court, U.S.
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In The

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED BY PETITIONER

Whether an individual who submits an application to engage in a First Amendment protected activity may challenge the licensing scheme as an invalid prior restraint if the application in question is denied based on unrelated grounds.

CORPORATE DISCLOSURE STATEMENT

The City of Roswell is a municipal corporation of the State of Georgia.

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I. RESPONDENT'S STATEMENT OF THE CASE

This matter arose out of the denial of several applications for permits to construct billboard signs made by Petitioner, Granite State Outdoor Advertising, Inc. ("Granite State") to Respondent, the City of Roswell, Georgia ("City"). The applications specified that each sign was to be 672 square feet in size and 70 feet in height, and to be placed at six different locations within the City. The first application for one sign was received on May 7, 2003. A letter rejecting that application was sent on May 13, 2003. The second application was received on June 2, 2003, and rejected on June 6, 2003. The third was made on June 12, 2003 and rejected on June 19, 2003. Each of the applications was rejected solely on the basis that the proposed signs exceeded the maximum allowable height and size under the portion of the City Zoning Ordinance pertaining to signage. On July 16, 2003, the City enacted a moratorium on the issuance of sign permits, which was in effect until September 15, 2004, when the sign ordinance was amended and the moratorium lifted. Petitioner claims it attempted to apply for three signs during the moratorium, but these were not accepted for processing.

Significantly, and contrary to the assertions made by Granite State in its Petition, Section 22.22 of the City sign ordinance in effect at the time of Petitioner's applications required the City to process all sign applications within 30 business days of receipt. This provision was completely complied with as set forth above.

Petitioner filed suit on May 21, 2003 after the rejection of the first application.[1] That suit was dismissed on January 16, 2004 after Petitioner's counsel failed to appear for a court-mandated conference. This matter was filed on March 5, 2004. Following discovery and depositions of the various representatives of the parties, Petitioner filed a Motion for Partial Summary Judgment on or about July 4, 2004. Respondent filed its Cross Motion for Summary Judgment on August 3, 2004.

Following oral argument, the Honorable Constance C. Russell of the Superior Court of Fulton County held a hearing on April 12, 2007, at which she issued an "Oral Ruling" from the bench, granting summary judgment to the Respondent. On May 14, 2007, Petitioner applied for leave to appeal, which was granted by the Supreme Court of Georgia on June 18, 2007.

On March 10, 2008, following oral argument, the Supreme Court of Georgia issued an Order affirming the lower court's opinion in part and vacating in part, but finding completely in favor of Respondent. The Court determined first that, consistent with both federal and Georgia State law, without having suffered

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[1] The Court may note that the case was filed against the City of Roswell and Jere Wood, its Mayor. The Georgia Supreme Court styled its opinion listing only Defendant/Appellee City of Roswell, and Petitioner has used that style in its Petition to this Court. Accordingly, we have used the singular form of Respondent in this response.

any injury in fact, Petitioner had no standing to bring the action challenging portions of the City Ordinance not applied to it. (Petition at 8a.). The Court also determined that because Petitioner lacked standing, it would not consider the remainder of Petitioner's constitutional challenges to the ordinance. (Petition at 8a-9a). The Court further determined that Petitioner's argument that the ordinance was unconstitutional because it allegedly failed to require City officials to act within a specified period of time was without merit because the ordinance specifically contained such a provision. (Petition at 9a). Moreover, the Court rejected Petitioner's argument that the lower Court erred when it failed to consider whether the moratorium imposed by the City was the least restrictive means because even if the moratorium had been invalid, the applications were properly denied. (Petition at 9a-10a). Finally, the Court determined that Granite State was not entitled to damages pursuant to 42 U.S.C. § 1983. (Petition at 10a).

On April 11, 2008, the Supreme Court of Georgia denied Petitioner's Motion for Reconsideration without further opinion. Petitioner has now filed the instant Petition for Writ of Certiorari to the Supreme Court of the United States.

In its underlying decision, the Supreme Court of Georgia followed and adopted the holding of the Eleventh Circuit Court of Appeals in *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112 (11th Cir. Fla., 2003). It is significant to note that as the name of the party implies, the Petitioner in the instant case was also the plaintiff in the

Clearwater action. Throughout its Petition, Granite State refers to that case as well as other Eleventh Circuit caselaw holding contrary to its arguments as "aberrant" and contrary to this Court's decisions. However, it should be noted that the very same argument that Granite State should be granted overbreadth standing to challenge portions of the Roswell City Ordinance not applied to it has already been denied Certiorari by this Court four years ago in *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 543 U.S. 813, 125 S.Ct. 48 (2004).

In the instant petition, Granite State's argument is only slightly different. Rather than restate its previously unsuccessful argument based on overbreadth alone, Granite State now claims that the City sign ordinance operated as a prior restraint on speech and for that reason, it should be granted relaxed standing to facially challenge the ordinance. The fatal defect with this argument, as set forth below, is that this Court's standing jurisprudence still requires that even under the prior restraint analysis, Petitioner must have suffered an injury in fact as a result of the challenged provision of the ordinance. Granite State also included this argument in its previous unsuccessful Petition for Certiorari in *Clearwater*.

Regardless of the method by which it is advancing its argument, the goal of Petitioner and its counsel is the same here as it was with all of the lower courts. They are asking this Honorable Court to overturn the previous decisions and apply overbreadth standing to facially challenge portions of a

local ordinance not applied to it, where there is a total absence of any actual injury. There is simply no precedent in either federal or Georgia law for doing so. If this Court rules as Petitioner requests, billboard companies will attempt to exploit the slightest constitutional weakness in municipal and county ordinances regardless of whether the challenged provision was applied to them or caused them any actual injury. This completely contravenes the jurisprudential requirements for standing found in both federal and Georgia law.

II. REASONS FOR DENYING THE PETITION

Petitioner argues that the Supreme Court of Georgia's decision in the underlying case conflicts with the decisions of this Court. U.S. S.Ct. Rule 10(c). However, it becomes clear based on a more thorough reading of the caselaw cited by Petitioner, that this is simply not the case. To the contrary, the Supreme Court of Georgia properly applied both Georgia and federal authority in determining that an injury in fact is required for Petitioner to have any standing whatsoever. This is regardless of whether the grounds for their argument is a prior restraint on First Amendment activity or any other basis on which any form of relaxed standing such as the overbreadth doctrine could be applied.

III. THE SUPREME COURT OF GEORGIA'S DECISION IS NOT CONTRARY TO THIS COURT'S JURISPRUDENCE REGARDING STANDING, EVEN WHERE FIRST AMENDMENT ACTIVITY IS INVOLVED.

Even under a prior restraint argument, Petitioner must have standing to challenge the provisions of the Ordinance complained of. Under the caselaw previously promulgated by this Court, there are three constitutional requirements for standing: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992), this Court held:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized [citations omitted] and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" [citations omitted] Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before this court." [citation omitted] Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." [citation omitted]

Id. at 560-61 (emphasis supplied).

This Court has also developed a series of "prudential" standing requirements. One of these is that a party is limited to asserting its own rights and not that of third parties. *Allen v. Wright*, 468 U.S. 737, 750-51, 104 S.Ct. 3315 (1984). However, this Court and other federal courts have created an exception to this particular prudential standing requirement in free speech cases, known as the overbreadth doctrine.

The leading case on the overbreadth doctrine is *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908 (1973). Under this doctrine, a party in a free speech case may have standing to assert the rights of third parties when a statute is applied constitutionally to the party before the court, but might be unconstitutional as applied to someone else. *Id.*

This Court has explained its rationale behind the overbreadth doctrine as follows:

> We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech-especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by

> suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Virginia v. Hicks, 539 U.S. 113, 119, 123 S.Ct. 2191 (2003). (citations omitted)

However, at the same time, the *Broadrick* Court cautioned:

> Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.

Broadrick, *supra* at 613.

"To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some 'threatened or actual injury resulting from the putatively illegal action. . . . '" *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392, 108 S.Ct. 636 (1988). (citations omitted) "Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, '[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected

speech or expression.'" *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 104 S.Ct. 2839 (1984), citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975).

Furthermore, "the overbreadth doctrine does not apply to commercial speech, but may only be used as an exception to prudential standing in the context of noncommercial speech." *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977). This Court has also held similarly in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186 (1982), citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980) and *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028 (1989). Accordingly, under all this volume of federal, as well as Georgia authority, the Supreme Court of Georgia was correct in not extending the overbreadth doctrine to Petitioner's challenge in the instant case. This is so, both because most, if not all of the activities to be engaged in, were commercial in nature and because Petitioner lacked standing to challenge the portions of the ordinance which did not cause it an injury in fact.

Petitioner's argument is essentially that because the ordinance functions as a prior restraint on First Amendment activity, it may facially challenge the entire ordinance as overly broad and thus bypass the standing requirement. In support of this, Petitioner cites a number of cases involving First Amendment activities for the proposition that it need not have

submitted applications for sign permits in order to have standing to challenge the ordinance.

However, these cases are not helpful, both because they are distinguishable and because they oversimplify the inquiry. It is not enough for Petitioner to argue that the Supreme Court of Georgia erred because it should have allowed a facial challenge to the entire sign ordinance as a prior restraint on First Amendment activity. Petitioner must satisfy the requirement of standing regardless of how it chooses to attack the ordinance. Even if the ordinance contained provisions that amounted to a prior restraint, the only portion of the ordinance which caused the Petitioner any injury in fact was the limitation on sign height and size. The Supreme Court of Georgia correctly held these to be wholly constitutional time, place and manner regulations. Without an injury in fact, even employing the overbreadth doctrine, Petitioner lacks standing.

The first case cited by Petitioner in support of this argument is *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277 (1958). There, several union organizers were prosecuted by a Georgia city for violating a local ordinance prohibiting solicitation without a permit. This Court held that the Plaintiffs had standing to challenge the ordinance as an unconstitutional prior restraint on free speech because it gave the city's mayor unbridled discretion to grant or deny such a permit. *Staub* is inapposite to the case at bar, however. Even though the union organizers had never applied for a permit, they had indeed suffered an

actual injury in that they were prosecuted and convicted for violating the ordinance, thus providing the constitutional requisite for standing.

Next, Petitioner cites *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S.Ct. 2138 (1988). The newspaper challenged a city ordinance required to permit newspaper vending machines on city property. Rather than apply for a permit or provoke prosecution, the newspaper launched a facial challenge to the ordinance on the basis that it granted the mayor unbridled discretion to grant or deny the permit. This Court allowed such a facial challenge, determining that the ordinance conferred unbridled discretion. Once again, however, this case is not instructive to the issue at bar because the plaintiff had suffered an actual injury as the ordinance undoubtedly proscribed its conduct.

Third, Petitioner cites *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080 (2002). There, a Jehovah's Witnesses' organization challenged a local ordinance requiring registration prior to engaging in door-to-door solicitation.

The plaintiff established at trial that "they did not apply for a permit because they derive their authority to preach from scripture. 'For us to seek a permit from a municipality to preach we feel would almost be an insult to God.'" *Id.* at 157. The Court further noted in a footnote that:

> Although the Jehovah's Witnesses do not themselves object to a loss of anonymity, they bring this facial challenge in part on the basis of overbreadth. We may, therefore, consider the impact of this ordinance on the free speech rights of individuals who are deterred from speaking because the registration provision would require them to forgo their right to speak anonymously.

Id. at 167.

In this case as well, there is little doubt that the plaintiff received an actual injury from the portion of the ordinance they were challenging – the permit requirement. Moreover, the defendant village apparently never challenged the issue of standing, and the term "standing" is not even mentioned in the decision. Rather, the discussion in the case is almost entirely focused on the strict scrutiny analysis of the nature of the right restricted by the ordinance, the nature of the city's interest in regulating the behavior of door-to-door solicitation, and the restrictiveness of the means chosen to regulate it.

Petitioner cites a number of other U.S. Supreme Court cases which it contends are contrary to the holding of the underlying Georgia Supreme Court decision. In *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (1992), this Court upheld a Tennessee statute outlawing solicitation for votes or engaging in campaign activities within 100 feet of a polling place as surviving strict scrutiny. The only part of the case that comes close to being relevant is Footnote 13,

which discusses the difference between a facial and as-applied challenge based on hypothetical scenarios discussed at argument. In no way does this case contradict the Georgia Supreme Court's decision in the case at bar.

Petitioner also cites *Secretary of State of Md. v. Joseph H. Munson Co. Inc.*, *supra*, as contrary to the Georgia Supreme Court decision. However, in *Munson*, this Court specifically stated that in order for the plaintiff to have standing, it was required to have suffered an actual injury. That Court allowed the facial challenge as a prior restraint because it concluded that such an injury had indeed occurred. This is completely consistent with the Georgia Supreme Court's decision in this case.

Petitioner next cites to a footnote from *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11, 101 S.Ct. 2882 (1981). That footnote does state that this Court has "never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others." *Id.* However, this fails to address at all the issue of whether such a party has suffered an injury in fact so as to meet the legal requirements for standing. Further, *Metromedia*, *supra*, a plurality decision only, arose as a challenge to a city ordinance which directly regulated off-premises and other types of signage based on their content. The plaintiff had clearly suffered a direct injury from the ordinance, thus granting it standing. There is no inconsistency

between this case and the Georgia Supreme Court's decision here.

Petitioner further cites *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395 (1992). There, in response to a history of racial demonstrations and counter-demonstrations, the county perceived a need to recoup the cost of police protection for such events. The county commissioners passed an ordinance which empowered the county administrator to impose permit fees for demonstrations. When the plaintiff inquired about the cost of a permit, it was quoted a fee of $100.00. The organization did not pay the fee or hold the demonstration. Instead, it filed a facial challenge to the ordinance. This Court determined that the ordinance granted unfettered discretion to the county administrator and constituted a prior restraint, thus rendering it unconstitutional. However, because the plaintiff could not hold the demonstration without paying the permit fee or risking prosecution, there was an actual injury suffered as a result of the challenged ordinance provision, thus affording standing. Once again, the Georgia Supreme Court's decision in the instant case is not inconsistent.

Another cited case is *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329 (1997). That case was a challenge to the Communications Decency Act brought specifically pursuant to an expedited review portion of the Telecommunications Act of 1961, which both granted jurisdiction and allowed facial challenges to such statutes. The plaintiffs actually sought to convert the

case to an as-applied challenge, which the Court did not allow. Moreover, there were a plethora of plaintiffs involved who were challenging various provisions in the law as facially overbroad. There was really no issue regarding standing or whether any of the plaintiffs had suffered an actual injury from the provisions being challenged. *Reno* cannot be considered inconsistent with the Georgia Supreme Court's holding in this case.

City of Littleton v. Z.J. Gifts D-4, LLC, 541 U.S. 774, 124 S.Ct. 2219 (2004) is similarly inapposite. That case dealt only with the issue of whether a city adult business licensing ordinance provided adequate prompt judicial review of the denial of such a license. The case arose after an adult business opened shop in a section of the city not zoned for such a use and without applying for a license. The business preemptively brought a Section 1983 action facially challenging the city ordinance. Once again, standing was not an issue, as the ordinance clearly proscribed the plaintiff's conduct. In the end, the Court found the city's licensing criteria constitutional both as content neutral and affording adequate judicial review.

Contrary to Granite State's argument, none of the cases cited in its Petition are actually inconsistent with the decision of the Supreme Court of Georgia that it lacked standing to challenge portions of the Respondent City's ordinance that did not cause it to suffer an actual injury. Further, none of these cases provides authority for the argument that when facially challenging a statute as a prior restraint or

overbroad, the party need not comply with the requirement of standing that they actually suffer an injury resulting from the challenged statutory provision.

In *Lakewood*, *supra*, this Court also noted "[i]ndeed, if one's conduct could not be proscribed by an offensive licensing scheme, the plaintiff could not suffer an actual injury under the challenged regulations." 486 U.S. at 755-56. This perhaps serves as the best distinguishing feature between the cases cited by Petitioner and the facts of the instant case. The only actual conduct on Petitioner's part proscribed by the Roswell City Ordinance was the height and size of the proposed signs.[2] It suffered no actual injury from any other provision of the ordinance or other source of regulation. In each of the prior restraint cases cited, whether a facial or as-applied challenge, the plaintiff suffered some direct form of injury as a result of the challenged provision. There is no basis in law for

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[2] As noted above, Petitioner's argument that the Ordinance contained no "non-illusory" time limits for the City to approve or deny the application is without merit. The ordinance contained a thirty-day time limit which was fully complied with, and no delay resulted. Petitioner fails to provide any authority for its position that the time limit provision here was "illusory." In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990), this Court held that a "licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228. Such was the case here.

Petitioner's argument that a party has standing to lodge a facial challenge to a prior restraint allegedly contained in a provision of the ordinance that did not apply to their conduct. On this basis, the Petition for Certiorari should be denied.

IV. CONCLUSION

Petitioner fails to meet the criteria of U.S. S.Ct. Rule 10 for review by this Court on a Writ of Certiorari. There are no compelling reasons why this Court should revisit the decision of the Supreme Court of Georgia. Despite Petitioner's arguments to the contrary, the authority it cites does not establish that the decision of the Georgia Court conflicts with the relevant decisions of this Court.

This Court's jurisprudence unequivocally states that a party must have suffered an injury in fact in order to meet the irreducible constitutional minimum for standing. The overbreadth doctrine allows this to be extended to claims that could be made by parties other than the litigant. However, nothing in the caselaw enumerating or explaining the overbreadth doctrine has allowed a party to assert standing when they have not suffered an injury by the portion of the statute that proscribed their conduct. Because Petitioner lacks the requisite link of an actual injury to assert standing in the first place, the argument that it is now asserting that portions of the ordinance never applied to it result in a prior restraint on First Amendment activities which might be asserted by

other parties is moot. Certainly, Petitioner has not been able to locate a case that has ever allowed such a convoluted form of standing or it would have argued such in its Petition. The decision of the Georgia Supreme Court that Petitioner lacked standing is entirely consistent with federal and United States Supreme Court jurisprudence, and for that reason, particularly when Granite State's nearly identical Petition was denied previously in *Clearwater*, *supra*, the instant Petition for Certiorari should be denied.

DATED, the 8th day of August, 2008.

Respectfully submitted,

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